Tabled by Mr David Gibson, Local Government and Shires Associations, 18 July 2006.

Local Government Association of NSW

Shires Association of NSW

NEW SOUTH WALES LEGISLATIVE COUNCIL

STANDING COMMITTEE ON SOCIAL ISSUES

Inquiry into the impact of the Commonwealth Work Choices legislation

Local Government and Shires Associations supplementary material

1. Letter to the Hon J. Howard MP dated 28 July 2005.
2. Letter from the Office of the Prime Minister dated 29 August 2005.
3. Letter from the Hon K. Andrews MP dated 12 September 2005.
4. Local Government and Shires Associations submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005* – 9 November 2005.
5. Letter to the Hon J. Howard MP dated 10 November 2005.
6. Letter from the Office of the Prime Minister dated 18 November 2005.
7. Letter from the Hon K. Andrews MP dated 22 March 2006.
8. Letter to the Mayors and General Managers of NSW Councils from the NSW Minister for Industrial Relations and the NSW Minister for Local Government dated 23 March 2006.
9. Letter to Mayors and General Managers from the Presidents of the Associations dated 30 March 2006.
10. Letter to General Managers dated 5 May 2006 with copies of the Disputes Referral Agreements and the Unfair Dismissal Referral Agreements.

GPO Box 7003 Sydney NSW 2001
L8, 28 Margaret St Sydney NSW 2000
Tel: (02) 9242 4000 • Fax: (02) 9242 4111
www.lgsa.org.au • lgsa@lgsa.org.au
ABN 49 853 913 882

Local Government
Association of NSW

Shires Association of NSW

Our Ref: I96/0018
Contact: David Gibson

28 July 2005

The Hon J. W. Howard MP
Prime Minister of Australia
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Prime Minister,

FEDERAL WORKPLACE RELATIONS REFORMS

The ***Local Government Association of New South Wales*** and the ***Shires Association of New South Wales*** (the 'Associations') represent councils in metropolitan and rural NSW. Currently there are 152 general purpose councils in NSW and 14 special purpose county councils (with functions such as noxious weed control, flood mitigation and water supply). The total number of staff engaged by general purpose councils (excluding county councils) is the equivalent of approximately 40,300 fulltime employees, the vast majority of which are covered by State award conditions and enterprise arrangements.

The Associations support and represent local councils by providing many specialist services including industrial relations, legal and policy advice, specialist publications and industry purchasing discounts. Through their activities, the Associations also promote and publicise the views of local government in New South Wales.

The purpose of this correspondence is to express the Associations' opposition to the workplace relations reform package that was announced on 26 May 2005. While the details of the proposed reforms are yet to be released in the form of a draft Bill, the Associations believe it to be an appropriate time to promote and publicise the concerns of local government.

In an address to the Sydney Institute on 11 July 2005, the objectives of the Government's workplace reforms were detailed as being:

1. The promotion of workplace agreements in order to lift productivity and hence the living standards of working Australians;
2. The removal of impediments to further job creation; and
3. The provision of a single set of workplace relations laws that will result in a modern and more competitive Australia.

GPO Box 7003 Sydney NSW 2001
L8, 28 Margaret St Sydney NSW 2000
Tel: (02) 9242 4000 • Fax: (02) 9242 4111
www.lgsa.org.au • lgsa@lgsa.org.au
ABN 49 853 913 882

The Associations are of the view that the Government's stated objectives will not be realised and achieved by the proposed reforms.

Further, in relation to local government, the Associations believe that the proposed workplace reforms will lead to confusion and uncertainty. Briefly stated the Associations' opposition to the proposed reforms are three fold. The Associations are concerned about:

1. The complexity and legal nature of the proposed reforms;
2. The limitation of the dispute resolution powers of the Australian Industrial Relations Commission (AIRC); and
3. The potential that councils may be exposed to an array of claims in other jurisdictions.

THE PROPOSED REFORMS MAY BE OVERLY LEGALISTIC

The Associations are apprehensive about the pursuit of a unitary workplace relations system that relies upon the corporations power. While section 220 of the *Local Government Act 1993* (NSW) provides that a local council is a statutory corporation, the question remains as to whether a local council can be considered to be a trading or financial corporation for constitutional purposes. The functions and charter of a local council are delineated by the provisions of the *Local Government Act 1993* (NSW). Those functions are not necessarily trading or financial in nature. As such, the Associations seek to avoid potentially costly and time consuming jurisdictional arguments about the corporate status of local government and thus oppose the reforms in their present form.

THE LIMITATION OF THE AIRC'S DISPUTE RESOLUTION POWERS

Over the years, the Associations' members have benefited from the assistance of a third party such as the Industrial Relations Commission of New South Wales in resolving industrial disputes across a wide array of issues. Often those disputes have canvassed issues outside the scope of the current allowable award matters identified in section 89A(2) of the *Workplace Relations Act 1996* (Cth). The organisations representing employees and employers in local government have developed a healthy respect for the role and function of the Commission in resolving matters that have come before the Commission because they could not be resolved at the enterprise level. To that end the Associations are concerned that the AIRC will be limited in the range of workplace matters that the Commission will be able to handle under its dispute resolution powers.

THE POTENTIAL THAT COUNCILS MAY BE EXPOSED TO CLAIMS IN OTHER JURISDICTIONS

The Associations estimate that over 40 councils and county councils employ less than 100 employees. The implication of this observation is that the restriction of access to remedies before industrial tribunals, employees will seek redress through other revenues across a number of jurisdictions such as common law claims, small claims in the Local Court of New South Wales, the Australian Human Rights and Equal Opportunity Commission, the Administrative Decisions Tribunal (NSW), the Anti-Discrimination Board of New South Wales and the Workers Compensation Commission (NSW).

While the Associations have identified the areas where it believes that local councils in New South Wales may be disadvantaged by the reforms to Australian Workplace Relations, the Associations would welcome an opportunity to liaise and consult with the government as it drafts the reforms in the coming months.

Should you have any queries in relation to this correspondence we invite you to contact the undersigned.

Yours faithfully,

Cr Genia McCaffery
President
Local Government Association of NSW

Cr Col Sullivan
President
Shires Association of NSW

OFFICE OF THE PRIME MINISTER
CANBERRA

Councillor Genia McCaffery
President
Local Government Association of NSW
GPO Box 7003
SYDNEY NSW 2001

29 AUG 2005

Dear Councillor McCaffery

Thank you for your letter of 28 July 2005 to the Prime Minister, co-signed by the President of the Shires Association of NSW, Councillor Col Sullivan, regarding the Australian Government's proposed reforms in workplace relations. The Prime Minister has asked me to reply on his behalf.

On 26 May 2005 the Prime Minister announced the government's plans for improvements to Australia's workplace relations system. The improvements are necessary to ensure the living standards of ordinary Australians continue to rise. Since 1996 real wages have risen by 14.7%, over one million and six hundred thousand new jobs have been created, the lowest strike rates recorded and lower interest rates. However, the task is not complete and we can do better.

To keep Australia strong, we must continue to improve the way we work together so that our country can compete more effectively in a global economy.

Our plan will not:

- cut four weeks annual leave;
- cut award wages;
- abolish awards;
- remove the right to join a union;
- take away the right to strike; and
- outlaw union agreements.

Our plan to safeguard wages and conditions

The government's plan will for the first time ever enshrine in legislation minimum conditions of employment. These include annual leave, personal/carers leave, parental leave (including maternity leave), and a maximum ordinary working hours per week. An independent *Australian Fair Pay Commission* will be established to set and adjust the minimum wage and classification wage rates presently contained within awards. Minimum wage rates can not fall below those set by the 2005 Safety Net Review decision but they will rise.

Our plan to safeguard workers with a modern award system

Awards will not be abolished. They will be updated so they continue to provide modern terms and conditions for those workers who choose not to have a workplace agreement.

Our plan to protect against unlawful dismissal

Workers will continue to be protected from unlawful termination, including dismissal on discriminatory grounds such as family responsibility, pregnancy, race and gender, union membership and political affiliations. It will also remain unlawful for workers to be forced to sign an Australian Workplace Agreement (AWA) or be sacked for refusing to sign an AWA. The government's plan includes assistance to workers who have been unlawfully dismissed.

Laws introduced in 1993 which govern some aspects of unfair dismissal have not worked. They have cost jobs and continue to make employers reluctant to take on more workers. For this reason, businesses in the federal system with up to 100 employees will be exempted from those provisions to generate more jobs in small and medium businesses, the engine room of the Australian economy.

Our plan for a simpler and easier process

The government's plan will make it simpler and easier for workers and employers to agree on working conditions. Workers on agreements currently earn more than their counterparts on awards. The government believes that working arrangements are best organised at the workplace level. All agreements will be required by law to meet the *Australian Fair Pay and Conditions Standard.*

The *Australian Fair Pay and Conditions Standard*

The new Standard will be the test for all agreements. It will safeguard workers rights and conditions because the agreement can be no worse than the minimum and award wages, as set by the *Australian Fair Pay Commission* and the guaranteed minimum conditions of employment as set out in legislation. The Office of the Employment Advocate will ensure that agreements meet these standards.

The *Australian Industrial Relations Commission*

To keep pace with our modern economy, the *Australian Industrial Relations Commission* will focus on dispute resolution and further simplification of awards.

Our plan for a National system of workplace relations

Australia currently has six overlapping workplace relations systems. Forcing employees and employers to work with this complexity is something we can no longer afford to do. Australia only needs one set of national laws to cover workplace relations.

Our plan for securing Australia's future

By working together we will create more jobs, with higher wages in a stronger economy and secure the future for Australian workers and their families.

If you would like further information on the Prime Minister's views on the need for workplace relations reform, please refer to a speech given to the Sydney Institute on Monday 11 July 2005. The speech can be found at:
http://www.pm.gov.au/news/speeches/speech1455.html

Thank you again for taking the time to write to the Prime Minister.

Yours sincerely

Jamie Briggs
Adviser

IN-29922

The Hon Kevin Andrews MP

Minister for Employment and Workplace Relations
Minister Assisting the Prime Minister for the Public Service

Cr Genia McCaffery and Cr Col Sullivan
Presidents
Local Government Association of NSW and
Shires Association of NSW
GPO Box 7003
SYDNEY NSW 2001

12 SEP 2005

Dear Cr McCaffery and Cr Sullivan

Thank you for your letter of 28 July 2005 concerning the Australian Government's proposals for workplace reform and the impact they may have on local government.

On 26 May 2005 the Prime Minister made an announcement about the direction of workplace relations reform in the Australian Government's fourth term. These changes are a sensible next step in the process of workplace relations reform that the Government began in 1996. Those reforms have helped achieve high productivity and wages growth. Since 1996 average wages for Australian workers have increased by 14 per cent after adjusting for inflation.

The Government's changes are designed to benefit ordinary Australians by enhancing business productivity and thereby generating higher levels of economic growth, job creation and workforce participation. This will be achieved by removing unnecessary barriers to agreement making and establishing a sustainable safety net which does not exclude the unemployed and low paid from the labour market. A modern workplace relations system will also provide a simplified framework that encourages choice and flexibility while removing unnecessary complexity.

I note from your letter that you have expressed concern regarding the creation of a unitary workplace relations system that relies upon the corporations power in the Australian Constitution. While I understand that local councils may, in the short term, require advice on whether they are constitutional corporations, the Government believes that a unitary workplace relations system is in all employers' and employees' long term interests. The present system is unduly complex and confusing. There are currently six different workplace relations systems in Australia with different awards and legislation that employers and employees must comprehend and apply. Six different workplace relations systems is simply unsustainable.

The Government's preference is to work towards a national system in a cooperative manner with the States. However, in the absence of a referral of power from the States, the Government will move towards a more efficient national workplace relations system relying on the corporations power in the constitution. Nonetheless you can be assured the Government is keen to ensure that the new system is accessible and that the transition to a national system is as smooth as possible for both employers and employees.

Your letter also raises the issue of the range of workplace relations matters that the Australian Industrial Relations Commission (AIRC) will be able to handle. The Government believes that parties to employment agreements should be encouraged to resolve disputes at the workplace level wherever possible. You may be assured that the Australian Industrial Relations Commission (AIRC) will retain a key role in the workplace relations system. It will remain the main mechanism for resolving disputes between employers and employees, as it has been since 1904.

Your letter expresses concerns about the possibility that Council may be exposed to claims in other jurisdictions as a result of the decentralisation of industrial relations. The scope of the proposed federal workplace relations system will cover all employees of constitutional corporations. The present system is unduly complex and confusing and the Government believes that the proposed changes represent an important step towards more flexible, simpler and fairer workplace arrangements.

The changes to unfair dismissal laws are designed to encourage job creation for small and medium businesses. The existing laws are a disincentive to increased employment due to the substantial time and cost of defending an unfair dismissal claim.

Over the last decade significant legislative reform of the workplace relations system by the Government has contributed to a strong economic performance and higher standards of living for Australians. While we are proud of this achievement, we realise that Australia's long term national interest demands further reform if we are to build on our recent progress. Our proposed changes represent the next step towards more flexible, simpler and fairer workplace arrangements. This is a necessary step if we are to sustain our prosperity, remain competitive in the global economy and meet the future challenges facing Australia.

Thank you for bringing your views on these important matters to my attention.

I hope that this letter has helped to clarify the Government's workplace relations reform plan.

Yours sincerely

KEVIN ANDREWS

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

Submitter: Mr. David Gibson – Director of Workplace Solutions

Organisation: Local Government Association of NSW &
Shires Association of NSW

Address: Level 8, 28 Margaret Street
SYDNEY NSW 2000

Phone: (02) 9242 4140

Fax: (02) 9242 4188

Email: david.gibson@lgsa.org.au

Local Government
Association of NSW

Shires Association of NSW

Submission to the Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the

Workplace Relations Amendment (Work Choices) Bill 2005

November 2005

TABLE OF CONTENTS

Introduction

The Local Government Association of NSW and the Shires Association of NSW (the Associations) oppose the proposed federal workplace reforms. Their reasons for doing so have been communicated to the Prime Minister and the Minister for Workplace Relations directly, and where relevant these reasons have been referred to in this submission.

In this submission, the Associations outline their concerns relating to provisions of the *Workplace Relations Amendment (Work Choices) Bill 2005* (the Bill) and associated transitional arrangements from the perspective of employer associations party to a significant industry award and operating largely in the NSW industrial jurisdiction.

It is the Associations' view that for NSW Local Government, the Bill will not simplify industrial relations. Further, the Associations and member councils are facing an uncertain and complex industrial environment that requires navigation of the provisions of the federal government's "WorkChoices" document, the Bill and its Explanatory Memorandum, yet to be promulgated regulations and the outcomes of award simplification and review processes. The Associations note scope of this Inquiry will not include the operation of the Award Review Taskforce, award simplification and variation to unfair dismissals and hence, this submission will not address the Associations' concerns in respect of these matters.

Local Government in New South Wales

1. New South Wales Local Government is a $6 billion industry. In 2004 councils employed 51,600 people[1] and managed infrastructure assets worth $55 billion[2]. The total income in each council ranges from $4.1million to $185million per anum.

2. The challenges outlined in this submission reflect the perspective and concerns of one of the single largest employers within metropolitan, rural and regional NSW.

3. Currently there are 152 general purpose councils in NSW and 14 special purpose county councils (with functions such as noxious weed control, flood mitigation and water supply).

4. Pursuant to section 220 of the *Local Government Act 1993* (NSW), councils are bodies corporate with responsibilities to:

    - provide goods, services and facilities, and to carry out activities appropriate to the current and future needs of local communities and the wider public;
    - provide administration for some regulatory systems under the *Local Government Act 1993* (NSW);
    - provide a role in the management, improvement and development of the resources of their area; and
    - have regard to the principles of ecological sustainable development in carrying out their functions.

5. Under the *Local Government Act 1993* (NSW), a council's charter must have regard to:

    - community leadership,
    - multiculturalism,
    - planning and providing for the needs of children,
    - management, development, restoration and conservation of the area's environment,
    - the long term and cumulative effect of decisions,
    - trusteeship of public assets,
    - facilitating stakeholder's involvement in the improvement and co-ordination of local government,
    - exercising regulatory functions without bias,
    - informing the community and State Government about council activities, and
    - being a responsible employer.

[1] Australian Bureau of Statistics, *Employed Wage and Salary Earners, Australia: Original Series*, cat. No. 6248.0,various issues.

[2] Department of Local Government, *Structural Reform of Local Government in New South Wales*, September 2004.

6. Under Chapter 6 of the *Local Government Act 1993* (NSW), a council may choose to involve itself in the provision, management or operation of the following service functions: community services; public health services; cultural, educational and information services; sporting, recreational and entertainment services; environment conservation, protection and improvement; waste removal, treatment and disposal; pest eradication and control; energy production, supply and conservation; water, sewerage and drainage; fire prevention, protection and mitigation; land and property development; housing; industry development and assistance; and tourism development and assistance.

7. Under Chapter 7 of the *Local Government Act 1993* (NSW), councils are required to exercise regulatory functions issuing approvals and orders.

8. Council employees in NSW undertake a large range of functions including:

    - accounting, audit and administration;
    - rates and valuation;
    - human resources;
    - town planning;
    - health and building;
    - community services and facilities;
    - recreation and cultural amenities;
    - public parks and reserves;
    - engineering, civil and technical works;
    - emergency services;
    - water supply and drainage;
    - libraries and library services;
    - property, plant and stores;
    - regulatory; and
    - waste collection and management.

Local Government Association of New South Wales and Shires Association of New South Wales

9. The Local Government Association of NSW was established in 1883 and primarily promotes the interests of urban councils. The Shires Association of NSW was established in 1908 to promote the interests of rural councils. The Local Government Association of NSW and Shires Association of NSW (the Associations) are registered as industrial organisations of employers pursuant to the provisions of section 294 of the *Industrial Relations Act 1996* (NSW).

10. The Associations support and represent local councils by providing many specialist services including industrial relations, legal and policy advice, specialist publications and industry purchasing discounts. Through their activities, the Associations also promote and publicise the views of local government.

11. The Associations' policies with respect to industrial relations and employment are as follows:

> "Change
>
> Local Government remains committed to securing the benefits of competition and reform for councils, their employees and the communities they serve at the industry and workplace levels. Local Government recognises that such change is best implemented through consultation and cooperation.
>
> Local Government supports the development of human resource management initiatives and practices to introduce and manage change. Councils are encouraged to develop and formalise employment arrangements specific to their needs through enterprise bargaining and workplace reform, reward for performance and skill and the adoption of best practice.
>
> Training
>
> Local Government will continue to participate in national training reform initiatives to ensure that development training and education has relevance to the needs of the industry. Councils are encouraged to develop training plans that demonstrate their commitment to education, training and skill development and that provide employees with reasonable and equitable access to training.
>
> Local Government supports the integration of language, literacy and numeracy (LLN) in training programs.
>
> Labour Market Programs
>
> Local Government supports the maintenance and development of job creation initiatives that suit the needs of the industry and that training and skills development are integral to such initiatives.
>
> The Good Employer
>
> Local Government supports and promotes equal opportunity for all employees. Councils are encouraged to develop policies and strategies that recognise their obligations and address employees' needs with respect to redeployment and redundancy, family responsibilities and harassment.
>
> Councils are encouraged to develop, in consultation with their employees, a systematic approach to managing occupational health and safety, reduction in the risk of workplace injuries and the promotion of injury management and occupational rehabilitation."

12. At their respective meetings in August 2005, the Associations' Executives resolved to express their opposition to the Federal Government's proposed workplace reforms on the following basis:

    (i) the complexity and legal nature of the proposed reforms;

    (ii) the limitation of the dispute resolution powers of the Australian Industrial Relations Commission (AIRC); and

    (iii) the potential that councils may be exposed to an array of claims in other jurisdictions.

13. Further, at its Annual Conference held in October 2005 , the Local Government Association of NSW (the LGA) resolved to express opposition to the following aspects of the proposed reforms:

    - the use of the corporations powers as the foundation of the workplace relations legislation. It is the view of the LGA that the proposed reforms will lead to uncertainty and additional cost due to their complex and legal nature;
    - the diminished role of the Australian Industrial Relations Commission (AIRC) under the reforms. Councils will not have the benefit of assistance from a third party experienced in employment related matters due to the limitations placed on the AIRC's dispute resolution powers. As a result, it is expected that councils will be exposed to an array of claims in non industrial jurisdictions – such as common law, anti discrimination and occupational, health and safety claims;
    - the use of Australian Workplace Agreements and their potential misuse. The LGA supports the right of Australian workers, such as those employed by Boeing Australia, at the RAAF Base at Williamstown, to choose a collective agreement and to be represented by a trade union if the workers decide that it is in their best interests. Individual employees with less bargaining power will enter into agreements with reduced real pay and conditions and where these agreements will not be subject to scrutiny by the AIRC;
    - council staff may be transferred from a state to a federal award, limited in its scope to the allowable matters;
    - there will be an end to skills based career structures, annual salary progression and the ability to improve wages to recognise changes in work value and pay equity;
    - loss of job security and an increase in the casualisation of the workforce;
    - protection from unfair dismissal will not be available to employees in workplaces where less than 100 employees are engaged.

Transitional arrangements for State organisations

14. The *Workplace Relations Amendment (Work Choices) Bill 2005* provides for a new Schedule 17 that will allow State registered employer associations to represent members who are moving into the federal system. To that end the observations made in this section are founded upon the assumption that the Associations' members are constitutional corporations and will be moving into the federal system.

15. A transitionally registered association would have three years to become registered under Schedule 1B of the *Workplace Relations Act 1996*. During the three year transitional period, the activities of the transitionally registered association would continue to be governed by the relevant State registration regime and not Schedule 1B of the federal Act.[3]

16. Save for Schedule 1B, the remaining provisions of the *Workplace Relations Act 1996* would apply to associations that are granted transitional registration. According to the Explanatory Memorandum[4] transitionally registered associations would be conferred the same rights and obligations as federally registered organisations.

17. The Associations express concern about the operation of clause 4 of the proposed Schedule 17. Clause 4 provides that regulations may be made enabling the AIRC to make orders in relation to the right of transitionally registered associations to represent the interests of particular classes or groups or employees.

18. The uncertainty caused by this proposed amendment stems from the fact that a transitionally registered association will have ongoing obligations in the State and Federal jurisdictions. In the absence of drafted regulations, the Associations remain unable to asses the impact of the regulations upon our operations, resources and structure.

19. The proposed clause 6(b) and (c) of Schedule 17 provides that an association's transitional registration would cease when the association is registered under Schedule 1B or alternatively three years after the commencement of Schedule 17.

20. As such to preserve their 'transitional' rights under the *Workplace Relations Act 1996* it is imperative that a transitionally registered association become an organisation that is registered under Schedule 1B.[5]

21. The Associations express concern that there may be difficulties associated with the registration of both Associations under Schedule 1B. On the reading of the Associations it appears that the proposed clause 7 of Schedule 17 may contradict the expectations and assurances afforded to the Associations in relation to the 'conveniently belong rule'.[6] It has been the expectation of the Associations that the 'conveniently belong rule' would not apply to transitionally registered associations seeking registration under Schedule 1B.

---

[3] Explanatory Memorandum of the *Workplace Relations Amendment (Work Choices) Bill 2005*, at paragraph 3736.

[4] See paragraphs 3747 and 3748 of the EM.

[5] See paragraph 3761 of the EM.

[6] See *WorkChoices: A Workplace Relations System*, Commonwealth of Australia, 9 October 2005, page 48; and paragraphs 3762 & 3763 of the Explanatory Memorandum.

22. According to the Explanatory Memorandum[7] the intent of clause 7 is to provide regulations that would make it a criterion for registration that a transitionally registered association is not substantially or effectively the same as a federal organisation. The effect of the proposed regulations upon the Associations is akin to the 'conveniently belong rule' that the Government had promised would not apply in that only one Association will be able to be registered under Schedule 1B.

23. The Associations note that the uncertainty over whether councils in NSW can be viewed as 'constitutional corporations' may require that the Associations have dual registration in both the State and federal jurisdictions.

[7] See paragraph 3764 of the EM.

Constitutional Corporations

24. Section 4 of the *Workplace Relations Amendment (WorkChoices) Bill 2005* defines an Australian employer as:

> *(a) an employer that is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or*
>
> *(b) an employer that is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or*
>
> *(c) an employer that is the Commonwealth; or*
>
> *(d) an employer that is a Commonwealth authority; or*
>
> *(e) an employer that is a body corporate incorporated in a Territory; or*
>
> *(f) an employer that carries on in Australia, in Australia's exclusive economic zone or in, on or over Australia's continental shelf activities (whether of a commercial, governmental or other nature) whose central management and control is in Australia; or*
>
> *(g) an employer that is prescribed by the regulations for the purposes of this definition.*

25. While the Associations can with certainty observe that their members are not Australian employers through the operation of items (b) – (f) above, the same cannot be observed with respect to (a) and (g).

26. There is at present some conjecture as to whether all councils engage in trading activities and are as such constitutional corporations.

27. The Associations note that in *R v Trade Practices Tribunal; ex parte St George County Council (1973)*, 130 CLR 533 a majority of the High Court held that a county council, established under the then *Local Government Act 1919* (NSW) for local government purposes, was not a trading corporation. In this instance the High Court held that the activities of St George County Council were to supply and install electrical fittings

28. In this decision, *Menzies* J observed that the county council in question was a corporation for local government purposes. In fulfilling its local government function the High Court determined that the county council had defined trading powers. *Menzies* J went on to hold that while the councils of many municipalities engage in trade, they are not 'trading corporations'[8] and therefore not constitutional corporations.

29. While the *St George County Council* decision has not been directly overturned, the Associations note that subsequent case law has broadened the scope of the corporations' power so that the purpose for which a corporation is formed is no longer the sole or principal criterion of its character as a trading corporation.[9] Rather the character of an entity is to be ascertained by reference to its established activities. If trading is a substantial, as opposed to peripheral activity, then the corporation in question, under this 'broad' approach may be deemed to be a trading corporation.

---

[8] *R v Trade Practices Tribunal; ex parte St George County Council (1973)*, 130 CLR 533 at 552 – 553.

[9] See *R v Federal Court of Australia; ex parte WA National Football League*, (1979) 143 CLR 190; *State Superannuation Board v Trade Practices Commission*, (1982) 150 CLR 282; *Commonwealth v Tasmania*, (1983) 158 CLR 1; *E v Australian Red Cross Society*, (1991) 27 FCR 310; *Re University of Wollongong (Academic Staff) Enterprise Agreement*, (1997) 74 IR 308; and *Burrows v Shire of Esperance*, (1998) 86 IR 75.

30. Given the precedent established by the *St George County Council* and that emerging case law has not clearly determined the level of trading activity required to characterise a trading corporation there appears to be an argument that some councils are not trading corporations and therefore not constitutional corporations.

31. This view is supported by the federal Minister for Local Government, Territories and Roads. In a press release dated 2 November 2005, the Honourable Jim Lloyd MP observed that:

> *"Councils may not come under the new system as they are not currently constitutional corporations which means that they will remain under the NSW system under their existing NSW award and there will be no change"*

32. It is the Associations' view that this would be an undesirable outcome. The operation of NSW Local Government in two separate industrial jurisdictions will mean that the *Workplace Relations Amendment (Work Choices) Bill 2005* fails to fulfil the objective outlined at section 3(b). That is, to establish and maintain a simplified national system of workplace relations.

33. Further, far from simplifying industrial relations for the Associations' members, the complexity and confusion that abounds in the question of whether councils are constitutional corporations is expected to generate litigation in the form of jurisdictional disputes.

History of regulation of terms and conditions of employment in local government

Current Award Regulation

34. There are three industry specific awards covering employees in NSW Local Government at the present time, viz:

    - *Local Government (State) Award 2004* (350 IG 471);
    - *Local Government Electricians (State) Award*, (291 IG 594);
    - *Local Government Engineers Senior Staff (NSW) Award 2005*, PR963000, (AW787459).

35. The *Local Government (State) Award 2004* (the 2004 Award) covers the vast majority of council employees undertaking the range of functions referred to in paragraph 8. Councils' senior staff, including general managers, as defined by section 332 of the *Local Government Act 1993 (NSW)*, are excluded from award coverage.

36. At the council level, conditions of employment are governed by the relevant award, council and/or enterprise agreements and in the case of senior staff as referred to above, contracts of employment.

History

37. In 1992, NSW Local Government commenced a comprehensive programme of Award Restructuring under the Structural Efficiency Principle of Wage Fixation. As a result, a number of classification based awards (containing over 400 classifications) were rationalised to form the *Local Government (State) Award 1992* (272 IG 696). The 2004 Award retains a single, skill based structure within which positions are broadbanded into levels according to six, generic skill descriptors. At the council level, positions are evaluated for placement in the award structure according to skills applied. This skill based structure removed impediments to multi skilling and progression and broadened the range of tasks that employees could be required to perform.

38. Excepting for trainees and apprentices, the 2004 Award establishes entry level rates of pay which are complemented by a salary system at the council level.

39. Further, conditions of employment (including hours and leave) and allowances have been rationalised with obsolete and discriminatory provisions removed.

40. NSW Local Government has expended considerable time and resources pursuing orderly industrial reform and improved productivity at the industry and council level. There is a strong desire to maintain the benefits that flow from having simplified and common employment conditions. The single and rationalised industry award provides a platform against which councils can review their operations and negotiate specific enterprise and council agreements when and if required.

Transitional treatment of State Awards and Award Rationalisation

41. The *Workplace Relations Amendment (Work Choices) Bill 2005* proposes to insert a new Schedule 15 into the principal Act.

42. The purpose of Schedule 15 is

> *"...to preserve for a time, certain terms and conditions of employment which apply to employers and employees and which arise under State or Territory industrial laws and State or Territory instruments that regulate terms and conditions of employment made under those laws,, as they were immediately prior to the reform commencement. These preserved terms would be contained in transitional instruments".*[10]

43. Clause 31 of Schedule 15 provides that if the terms and conditions of employment of employees are regulated by a State award then a ***notional agreement preserving State awards*** is taken to come into operation on the reform commencement.

44. It is noted that a notional agreement preserving a State award will not operate as one distinct instrument that regulates different employers in a particular industry but rather between individual employers and their employees at the enterprise level.[11] Further, a notional agreement preserving a State award will not come into operation if any term or condition of an employee's employment with an employer is regulated by a State employment agreement at the reform commencement.[12] This approach represents a departure from long established arrangements in NSW Local Government where employment conditions have been regulated by an industry award underpinning enterprise or council agreements that provide for council specific conditions.

45. Notional agreements preserving State awards will, according to the proposed clause 33 of Schedule 15, cease to be in operation:

    (a) at the end of a period of three years beginning on the reform commencement;
    (b) if a workplace agreement comes into operation;
    (c) if an employee becomes bound by an award.

46. Clause 35(1) of Schedule 15 proposes that the terms of the *Local Government (State) Award 2004* would be taken to be terms of the notional agreement.

47. There are however some terms of the *Local Government (State) Award 2004* that will not transmit to the notional agreement. They are:

    (a) Those clauses of the current Award that make reference to the Industrial Relations Commission of New South Wales;[13]
    (b) The grievance and dispute resolution clause found at clause 30 of the current Award;[14]

---

[10] Explanatory Memorandum of the *Workplace Relations Amendment (Work Choices) Bill 2005*, at paragraph 3373.

[11] Em at para 3443.

[12] See proposed clause 31(b) of Schedule 15 and EM at para 3446.

[13] See clause 36 of Schedule 15 of the *Workplace Relations Amendment (Work Choices) Bill 2005*.

[14] see clause 37.

(c) Any clauses that contain prohibited content of a prescribed kind;[15]

(d) The clause and table outlining the rates of pay in the current Award.[16]

48. The Associations express concern that the *Workplace Relations Amendment (Work Choices) Bill 2005* has failed to define prohibited content as it appears in the proposed clause 38 of Schedule 15. The proposed section 101D provides that the "*...regulations may specify matters that are **prohibited content** for the purposes of this Act.*" This approach creates uncertainty over which, if any, of the *Local Government (State) Award 2004* Award terms will not transmit to the notional agreement or which clauses may, pursuant to the proposed clause 42, be removed at the discretion of the Employment Advocate.

49. On the Associations' reading of the Bill, the terms of the *Local Government (State) Award 2004* that relate to the regulation and setting of wages will not be incorporated into the subsequent notional agreement. The Associations believe that this amendment will be problematic as the *Local Government (State) Award 2004* establishes increases in wages applied periodically over the life of the award. The next award instalment is due in November 2006. These increases were negotiated by the award parties in good faith, to reflect consideration of work value changes, productivity improvements, local government reform and community movements. The Associations' commitment to the scheduled increases to the minimum rates of pay prescribed by the *Local Government (State) Award 2004* remains unchanged. However, where rates of pay are not a feature of a notional agreement, the mechanism for implementing the increases at the council level remains unclear.

50. Further, the 2004 Award's provisions with respect to rates of pay has provided councils with a framework of fair entry level rates around which each council can design a single salary system to suit its specific organisation structure and budget the range of work undertaken and skills applied. The removal of this integral award provision will have a negative effect on councils' management of salary budgets during the transitional period and at least until there has been significant progress in settling the detail of the Fair Pay and Conditions Standards and the Award Rationalisation process.

51. The proposed section 90A provides that the new Australian Fair Pay Commission is to have regard to any relevant recommendations made by the Award Review Taskforce. The Associations note that this is the only reference to the Award Review Taskforce in the entire *Workplace Relations Amendment (Work Choices) Bill 2005.*

52. At paragraph 1675 of the Explanatory Memorandum to the Bill, it is explained that the Award Review Taskforce will make recommendations to the Government on how to rationalise awards:

- on an industry basis;
- to permit general coverage of employers and employees (and appropriate organisations of employers and employees) according to relevant industry sector based awards; and
- to address coverage of award free employers

53. The Associations express concern that guidelines about how the Award Review Taskforce is to operate and how it is to be advised have yet to be detailed.

54. As a party to a State award that covers the majority of employees and council workplaces in NSW, the Associations believe that a single federal award addressing the unique needs and experience of NSW Local Government is to be preferred.

---

[15] see clause 38.

[16] see clause 44 and the EM at para 3470.

55. To that end the Associations note that *Workplace Relations Amendment (Work Choices) Bill 2005* does not make provisions for the making of a federal award where an industry has been covered by a single State award.

56. It appears to the Associations that the only way that their preferred option of a single federal award covering councils in NSW can be pursued is through the Award Rationalisation process. That entails a recommendation of the Award Review Taskforce to the Minister who in turn pursuant to the proposed section 118(2) makes a request to the AIRC for the making of an award to give effect to the Award Rationalisation Process.

57. The Associations express concern that the legislation does not make explicit provisions for the involvement of interested parties, such as the Associations, to contribute to the Award Rationalisation Process.

58. The Associations would welcome the opportunity to make submissions to both the Award Review Taskforce and the Minister prior to the making of a request pursuant to the proposed section 118(2) for Award Rationalisation.

Federal Minimum Wage and the Australian Pay and Classification Scale

59. The Associations wish to express concern at the proposed section 90Q that sets the Federal Minimum Wage (FMW) at $12.75 per hour. The Associations assert that the FMW should be maintained and reviewed on an annual basis.

60. The Associations note that pursuant to the combined operation of sections 90W(2)(a) and 90ZD that a preserved Australian Pay and Classification Scale (APCS) will apply to the Associations' members.

61. The proposed section 90ZD provides that a pre-reform wage instrument such as a State Award that contains provisions determining rates of pay will from the reform commencement be taken to be a ***preserved APCS***.

62. An APCS is a set of provisions that relate to pay and loadings for employees [section 90W(1)]. Pursuant to the proposed section 90X an APCS must contain:

    - Rate provisions determining basic periodic rates of pay;
    - Provisions describing the relevant classifications; and
    - Coverage provisions

63. The proposed section 90X(3) provides that rate provisions in an APCS must not include provisions for automatic rate increases.

64. Once again the Associations note that the current *Local Government (State) Award 2004* provides for increases in wages applied periodically over the life of the Award. The next and final award instalment is due in November 2006. The Associations agreed to these in good faith and remain committed to them. Such increases in rates of pay cannot be guaranteed to existing local government employees, with the removal of the increases from the APCS.

65. The consistency and harmony achieved through a framework of fair entry level rates of pay that are consistent across all NSW councils as a result of the consolidation process undertaken by the stakeholders in 1992 will be undone.

Local Government Association of NSW

Our Ref: I05/0027 Out-13041
Contact: David Gibson

10 November 2005

The Hon. J W Howard MP
Prime Minister of Australia
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

FEDERAL WORKPLACE RELATIONS REFORMS

A number of motions relating to the Federal Government's reform of Australian workplace relations were carried at the 2005 Annual Conference of the ***Local Government Association of New South Wales*** (the Association).

The motions considered the proposed package of reforms as detailed in the Ministerial Statement of 26 May 2005, the Prime Ministerial Address to the Sydney Institute on 11 July 2005 and the *WorkChoices: A new Workplace Relations System* booklet released on 9 October 2005.

The Conference resolved that the Association express its opposition to the proposed package of workplace reforms.

The Association is opposed to the use of the corporations powers as the foundation of the workplace relations legislation. It is the Association's view that the proposed reforms will lead to uncertainty and additional cost due to their complex and legal nature. While section 220 of the *Local Government Act 1993* (NSW) provides that a local council is a statutory corporation, the question remains as to whether a local council can be considered to be a trading corporation for constitutional purposes. Therefore, councils are likely to face the potential of costly and time consuming jurisdictional arguments about the corporate status of Local Government.

The Association is opposed to the diminished role of the Australian Industrial Relations Commission under the reforms. Councils will not have the benefit of assistance from a third party experienced in employment related matters due to the limitations placed on the AIRC's dispute resolution powers. As a result, it is expected that councils will be exposed to an array of claims in non industrial jurisdictions – common law, anti discrimination and OHS.

.../2

GPO Box 7003 Sydney NSW 2001
L8, 28 Margaret St Sydney NSW 2000
Tel: (02) 9242 4000 • Fax: (02) 9242 4111
www.lgsa.org.au • lgsa@lgsa.org.au

The Association is also opposed to the use of Australian Workplace Agreements and their potential misuse. The Association supports the right of Australian workers, such as those employed by Boeing Australia at the RAAF Base at Williamstown to choose a collective agreement and to be represented by a trade union if the workers decide that it is in their best interests. Individual employees with less bargaining power will enter into agreements with reduced real pay and conditions and where these agreements will not be subject to scrutiny by the AIRC.

Additional grounds for opposition to the reforms include:

- Council staff may be transferred from a state to a federal award, limited in its scope to the allowable matters.
- There will be an end to skills based career structures, annual salary progression and the ability to improve wages to recognise changes in work value and pay equity.
- Loss of job security and an increase in the casualisation of the workforce.
- Protection from unfair dismissal will not be available to employees in workplaces where less than 100 employees are engaged.

I invite your response to the Association's concerns which were ventilated at the LGA Conference last month.

Yours sincerely

Genia McCaffery

Cr Genia McCaffery
President
Local Government Association of NSW

IR- 30459.

OFFICE OF THE PRIME MINISTER
CANBERRA

18 NOV 2005

+ attached

I05/0027

Councillor Genia McCaffery
President
Local Government Association of NSW
GPO Box 7003
SYDNEY NSW 2001

Dear Councillor McCaffery

Thank you for your correspondence of 10 November 2005 to the Prime Minister, on behalf of the Local Government Association of New South Wales, regarding workplace relations reform. The Prime Minister has asked me to reply on his behalf.

On 2 November, the Australian Government introduced the Workplace Relations Amendment (Work Choices) Bill 2005 into the Parliament. The legislation will implement the government's *WorkChoices* reforms and move Australia towards a flexible, simple and fair workplace relations system.

Over the past ten years, Australian workers and businesses have been changing the way they work. As a group and individually, more employees and employers have been sitting down together, talking and working out their own innovative workplace arrangements. This co-operative approach has helped to build one of the strongest economies in the world. Australia is exporting more and over 1.7 million jobs have been created since 1996. The unemployment rate has been markedly reduced, reaching a 30 year low. Interest rates are also at historically low levels and the real wages of Australian workers have increased by 14.9 per cent since 1996.

But to continue the growth and prosperity, more needs to be done. We need to find new ways for business and workers to work together to implement fair, practical and sensible improvements to their workplace arrangements. There needs to be more choice and flexibility for both employees and employers. This is the best way to reward effort, increase wages, and balance work and family life.

Australia has over 130 different pieces of industrial relations legislation, over 4,000 different awards, and six different workplace systems operating across the country. There are too many rules and regulations making it hard for many employees and employers to get together and reach agreement in their workplaces. To remove this complexity the Australian Government is moving towards one, simpler national workplace relations system.

The government is establishing a new and totally independent wage setting body called the *Australian Fair Pay Commission.* The Fair Pay Commission's objective will be to promote the economic prosperity of the people of Australia. The Fair Pay Commission will set and adjust minimum and award classification wages, minimum wages for juniors, trainees/apprentices and employees with disabilities, minimum wages for piece workers and casual loadings. Minimum and award classification wages will be protected at the level set after the inclusion of the increase from the AIRC's 2005 safety net review. They will not fall below this level and will increase.

Professor Ian Harper, one of Australia's most distinguished economists, has been appointed to Chair the Fair Pay Commission. An important objective of the Fair Pay Commission will be to consider the capacity of the unemployed to get a job and to provide a safety net for the low paid.

Awards will continue to be maintained under the *WorkChoices* legislation. New and existing workers can continue to be covered by awards.

The government will legislate, through the *Australian Fair Pay and Conditions Standard,* minimum conditions of employment for the first time. This includes four weeks of annual leave, ten days of personal leave, fifty two weeks of parental leave and a maximum thirty eight ordinary hours per week. When workers bargain, these minimum conditions must be met.

In addition, several award conditions must be specifically addressed when an agreement is negotiated, if the agreement is to vary them. These award conditions are penalty rates, public holidays, rest breaks, incentive based payments and bonuses, annual leave loadings, allowances and shift/overtime loadings.

Existing employees will retain protection in law from being forced to sign an Australian Workplace Agreement. They will also be able to use a bargaining agent to assist them in negotiating an AWA. The agent can be a trade union representative or any other adult on whose advice the employee can rely. If the person is under 18 years of age they will need to get an appropriate adult (such as a parent or guardian, but not the employer) to sign the agreement before it can be lodged with the Office of the Employment Advocate.

Finally, the government will retain a significant role for unions in the new system and freedom of association will continue to be protected by law.

For more information about the Australian Government's *WorkChoices* proposals, you may wish to visit the *WorkChoices* website www.workchoices.gov.au.

I hope that this reply has helped to clarify the Australian Government's *WorkChoices* reforms. Thank you again for taking the time to write to the Prime Minister.

Yours sincerely

Jamie Briggs

Jamie Briggs
Adviser

IN-31182

The Hon Kevin Andrews MP

Minister for Employment and Workplace Relations
Minister Assisting the Prime Minister for the Public Service

Cr Genia McCaffery
President
Local Government Association of NSW
GPO Box 7003
SYDNEY NSW 2001

Dear Cr McCaffery

Thank you for your letter of 10 November 2005, concerning WorkChoices, the Australian Government's workplace relations reforms and conveying the substance of resolutions from the 2005 Annual Conference of the Local Government Association of New South Wales. I apologise foe the delay in responding.

You wrote to me previously on 28 July 2005 about these matters and in my letter to you of 12 September 2005, I responded to many of the concerns raised by your Association in your current letter.

I note, for example, that you continue to be opposed to the use of the corporations power to implement the WorkChoices reforms.

I understand that some local councils may have questions about whether they are a trading and financial corporation, and therefore within the scope of the reformed *Workplace Relations Act 1996* (WR Act). While I appreciate that some local councils may, in the short term, require advice on whether they are constitutional corporations, the Australian Government believes that a unitary workplace relations system is in all employers' and employees' long term interests. The present system is unduly complex and confusing. There are currently six different workplace relations systems in Australia with a host of different awards and legislation that employers and employees must understand and apply. The co-existence of six systems is simply unsustainable and the Government's WorkChoices reforms are the first, ground-breaking step to improve this situation.

The Australian Government's preference is to work towards a unified national system in a cooperative manner with the States. The States can and should obviate any questions regarding the coverage of local councils by referring responsibility for workplace relations matters to the Commonwealth and ensuring that Australia benefits from one single national workplace relations system.

You have also raised the issue of the range of workplace relations matters that the Australian Industrial Relations Commission (AIRC) will be able to handle under its dispute resolution powers. You may be assured that the Australian Government recognises a continuing and legitimate role for the AIRC, which will retain an important role in assisting employees and employers to resolve workplace disputes.

You also express concern that under WorkChoices, local councils may be exposed to an increased number of dismissal-related claims in jurisdictions other than the WR Act. As you may be aware, workers compensation and occupational health and safety are matters that are primarily a matter for State and Territory Governments. The Australian Government only has responsibility for employees of the Commonwealth. The *Workplace Relations Amendment (Work Choices) Act 2005* will not change these arrangements.

Australian Workplace Agreements (AWA) will remain optional under the new system and it will remain unlawful for any employer to force an employee onto an AWA or dismiss them for refusing to agree to an AWA.

Collective agreements, both union and non-union, will continue to be available in the new system and unions will retain the right to represent employees in AWA negotiations, if that is what the employee wants.

Under the WorkChoices reforms, employees will be able to gain access to a range of assistance in negotiating an AWA. They are entitled to appoint a bargaining agent to assist them. The agent can be a friend, relative, solicitor, trade union representative or any other person on whose advice the employee can rely. Advice and assistance will also be available from the Office of Workplace Services and the Office of the Employment Advocate.

You have suggested that the reforms will lead to loss of job security and increased 'casualisation' of the workforce. These are the same kinds of predictions that were made in relation to the Australian Government's initial workplace relations reforms in 1996. Since then, over 1.7 million new jobs have been created and real wages have risen by 16.8 per cent. Previous workplace relations reform has helped build a strong economy and the new WorkChoices reforms will continue that process.

I hope this has helped to clarify the Australian Government's workplace relations reform plans.

Yours sincerely

KEVIN ANDREWS

22 March 2006

Minister for Industrial Relations **Minister for Local Government**

March 23, 2006

TO MAYORS AND GENERAL MANAGERS OF NEW SOUTH WALES COUNCILS

I refer to the Commonwealth's Work Choices legislation that will take effect from 27 March 2006.

The New South Wales Government strongly opposes the Commonwealth's plan for a new industrial relations system. The Work Choices legislation is an attack on the lives of working Australians and their families by denying a right to a fair go. For employers it will lead to confusion and complexity. Work Choices attempts to force employers and employees out of the state systems they are familiar with and which have served them well over the years.

The New South Wales Government supports an industrial relations system that is based on:

- The right of employers, unions and employees to make industrial arrangements without governments dictating as to what can and can't be agreed.
- A fair minimum wage set by a truly independent tribunal, after a public hearing.
- An up-to-date and comprehensive safety net for all workers.
- An independent umpire with broad dispute-settling powers, including disputes about dismissal.
- Special protections for vulnerable workers, including protection from exploitative contracting arrangements.

The NSW Industrial Relations Act 1996 and the Local Government Awards support this policy and have served councils and their employees well, providing a sound basis for fair and productive workplace relationships. We note that the Local Government and Shires Associations of NSW have expressed their public opposition to Work Choices and have lent their support to the New South Wales framework.

To preserve this policy framework the New South Wales Government has initiated a challenge to the Work Choices legislation in the High Court of Australia. This challenge has been joined by all states and territories and will commence on 4 May 2006.

Further, a recent amendment to the Industrial Relations Act 1996 (NSW) effective from 13 March 2006 allows employers and unions to enter into common law agreements unfettered by the restrictive terms of Work Choices and confers jurisdiction on the NSW Industrial Relations Commission to exercise conciliation and arbitration powers in respect of a dispute that arises thereunder.

Adding to this complexity is the federal government's reliance upon the corporations powers of the Australian Constitution to support Work Choices. This is of particular significance to councils. Whilst the Local Government Act 1993 confers body corporate status to councils this does not mean that a council is a constitutional corporation for the purposes of Work Choices. The question of whether a council is a constitutional corporation will be determined having regard to its trading and financial status on a council by council basis.

The New South Wales Government strongly encourages councils to defer any consideration of the Work Choices legislation until the completion of the High Court proceedings and to avail themselves of the recent amendments made to the NSW legislation.

Until the Work Choices legislation has been constitutionally examined, there can be no certainty as to whether a decision made by a council to rely upon the Work Choices legislation will be legally valid. Ratepayers and local communities need to have confidence they are getting the best possible services and that local governments are using public funds responsibly. To this end, councils are encouraged to work within the industrial relations policy of the New South Wales Government and continued reliance on existing industrial arrangements at each council would provide certainty and stability to all concerned.

It would be appreciated if your council could respond to this letter to the Office of the Minister for Industrial Relations, Level 30, Governor Macquarie Tower, 1 Farrar Place, Sydney NSW 2000.

Yours sincerely

John Della Bosca MLC
Minister for Industrial Relations

Kerry Hickey MP
Minister for Local Government

Local Government Association of NSW

Shires Association of NSW

30 March 2006

TO MAYORS AND GENERAL MANAGERS

WORK CHOICES

On 23 March 2006 the Minister for Industrial Relations, the Hon John Della Bosca MLC and the Minister for Local Government, the Hon Kerry Hickey MP, jointly wrote to all Mayors and General Managers advising that the New South Wales Government was strongly opposed to Work Choices. The Ministers urged councils to *"...defer any consideration of the Work Choices legislation until the completion of the High Court proceedings..."*. Councils would also be aware that the Associations have expressed their opposition to Work Choices.

The substantive parts of the *Workplace Relations Amendment (Work Choices) Act 2005* commenced operation on 27 March 2006. The Act applies to constitutional corporations, and as such, councils that are constitutional corporations (see Local Government Weekly 07/06) should comply with the Act until the High Court declares otherwise.

Specifically, as from 27 March 2006, councils which are constitutional corporations will be bound by the terms of a Notional Agreement Preserving a State Award (NAPSA) and not the *Local Government (State) Award 2004* (see Local Government Weekly 12/06). Those councils with State registered enterprise agreements or enterprise awards will be covered by a Preserved State Agreement (PSA). The Associations advise that councils implement the changes relating to the relevant instrument governing the terms and conditions of employment of staff, and defer consideration of other aspects available under Work Choices until the High Court has handed down its decision as to the legislation's validity.

The NSW Government has amended the *Industrial Relations Act 1996* to allow parties to enter into common law agreements that confer jurisdiction upon the Industrial Relations Commission of NSW to exercise conciliation and arbitration powers in respect of nominated matters (see Local Government Weekly 12/06). Councils should consider this option as a means of resolving disputes through the State Commission. The Associations will be drafting a referral agreement to give effect to this option.

In the meantime, the Associations and the Unions have agreed to maintain industry arrangements for notifying and resolving disputes at the local level. Such an approach preserves the arrangements that have served the industry well in successfully resolving most disputes at the local level. The Associations encourage councils to confer locally as soon as they become aware that a grievance or dispute exists.

Further items will appear in the Local Government Weekly providing advice and assistance to councils on Work Choices. Should you have any questions in relation to this correspondence please feel free to contact David Gibson on (02) 9242 4142.

Yours faithfully

Genia McCaffery

Cr Genia McCaffery
President
Local Government Association of NSW

B.J. Sullivan

Cr Col Sullivan OAM
President
Shires Association of NSW

GPO Box 7003 Sydney NSW 2001
28 Margaret St Sydney NSW 2000
Tel: (02) 9242 4000 Fax: (02) 9242 4188
www.lgsa.org.au lgsa@lgsa.org.au

Local Government
Association of NSW

Shires Association of NSW

Our Ref: I06/0024
Contact: David Gibson

5 May 2006

«GM_MR_MS» «GM_1ST_NAME» «GM_2ND_NAME»
«GM_ACTING_GM»
«NAME_LONG»
«POST_BOX_ETC»
«POST_LOCALITY» «POST_CODE»

Dear «GM_MR_MS» «GM_2ND_NAME»

DISPUTE RESOLUTION – REFERRAL AGREEMENTS AND THE USU COMMON LAW DEED

On 4 May 2006, the Associations' Industrial Panel considered a report on the use of referral agreements and common law deed to resolve industrial disputes. The Panel endorsed two template referral deeds developed by the Associations and local government unions and declined to endorse the United Services Union's (the USU's) pro forma common law deed. These matters have been referred to the Associations' respective Executives for their endorsement of the Panel's actions.

Referral Agreements

Councils were advised in LG Weekly 12/06 Item 6 that on 13 March 2006 the *Industrial Relations Act 1996* (NSW) was amended to provide that the NSWIRC may be permitted to resolve disputes between parties in instances where the parties have agreed, by way of a referral agreement, on the scope of matters that may be referred to the NSWIRC and also the scope of functions that may be exercised by the NSWIRC.

In this regard the Associations and local government unions have developed and endorsed two referral agreements.

The first is a broad referral agreement that:

- Applies to the Associations, local government unions and their members;
- Excludes general managers and senior staff;
- Requires that prior to making an application the union parties must notify council and the Associations and where practicable the parties must confer;
- Enables the parties to notify the NSWIRC of disputes if they remain unresolved at the workplace level;
- Enables the NSWIRC to utilise the conciliation and arbitration powers prescribed by the agreement.

GPO Box 7003 Sydney NSW 2001
L8, 28 Margaret St Sydney NSW 2000
Tel: (02) 9242 4000 • Fax: (02) 9242 4111
www.lgsa.org.au • lgsa@lgsa.org.au
ABN 49 853 913 882

The second referral agreement pertains to claims relating to dismissals alleged to have been unfair. The unfair dismissal referral agreement:

- Applies to the Associations, local government unions and their members;
- Excludes general managers and senior staff;
- Requires that prior to making an application the union parties must notify council and the Associations and where practicable the parties must confer;
- Provides that if unresolved the relevant union may file a claim with the NSWIRC;
- Enables the NSWIRC to exercise the conciliation and arbitration powers prescribed by Pt 6 of Chapter 2 of the Industrial Relations Act 1996 (NSW);
- Requires the relevant union to provide an undertaking of the member or members that remedy in relation to the dismissal will not be pursued in any other jurisdiction.

Copies of these referral agreements may be downloaded from http://www.lgsa.org.au/www/html/139-work-choices.asp .

The Common Law Deed

The Associations are aware that the USU has approached councils seeking agreement to a legally enforceable common law deed regulating terms and conditions of employment falling outside of the scope of the Work Choices legislation. The Associations and local government unions have discussed potential terms of such a deed and have not reached agreement at this time.

Councils are advised that it is the Associations' view that the pro forma deed sought by the USU offers very little certainty or clarity for councils and poses the following problems:

- A council's obligations under its NAPSA, policies, PSAs and contracts are duplicated by the deed and therefore the council may face disputes over a breach of the relevant instrument as well as the deed.
- The deed exposes a council to litigation in high cost common law jurisdictions (e.g. equity) as well as litigation in the State and Federal industrial jurisdictions.
- The USU is only bound by the deed in respect of members and potentially those employees nominating the union as their bargaining agent, whereas the council is bound in respect of all of its employees.
- The deed restricts a council and its employees from varying any of the conditions of employment referred to in the deed in the future.

Councils are advised that the Associations do not recommend the USU's pro forma deed in its present form and discussions are continuing with the unions. Councils considering entering into such arrangements are encouraged to seek the Associations' or other appropriate advice.

Should you have any queries in relation to this correspondence we invite you to contact the Director of the Associations' Workplace Solutions Division, Mr David Gibson on (02) 9242 4142.

Yours sincerely

Genia McCaffery

Cr Genia McCaffery
President
Local Government Association of NSW

C.J. Sullivan

Cr Col Sullivan OAM
President
Shires Association of NSW

REFERRAL AGREEMENT

THIS REFERRAL AGREEMENT is made this day of July in the year Two Thousand and Six, between the following parties:

INSERT NAME OF COUNCIL of insert street address, insert suburb or town in the State of New South Wales (the "Council"); and

LOCAL GOVERNMENT ASSOCIATION OF NEW SOUTH WALES or SHIRES ASSOCIATION OF NEW SOUTH WALES of Level 8, 28 Margaret Street, Sydney in the State of New South Wales (the "LGSA"); and

NEW SOUTH WALES LOCAL GOVERNMENT, CLERICAL, ADMINISTRATIVE, ENERGY, AIRLINES AND UTILITIES UNION of Level 7, 321 Pitt Street, Sydney in the State of New South Wales (the "USU"); and

DEVELOPMENT AND ENVIRONMENTAL PROFESSIONALS' ASSOCIATION of 106/118 Great North Road, Five Dock in the State of New South Wales ("depa"); and

LOCAL GOVERNMENT ENGINEERS' ASSOCIATION of Level 1, 491 Kent Street, Sydney in the State of New South Wales (the "LGEA").

RECITALS

A. The Council, the LGSA, the USU, depa and the LGEA have agreed to resolve disputes concerning industrial matters arising between them about the employment of Council employees, who are members or eligible to be members of the USU and/or depa and/or the LGEA, by allowing such matters to be referred to the Industrial Relations Commission of New South Wales (the "Commission") as allowed pursuant to the provisions of section 146A of the *Industrial Relations Act 1996* (NSW) (the "Act"), in accordance with the terms of this Referral Agreement.

B. Where such disputes concerning industrial matters arise the parties agree that they would be assisted in resolving these disputes by the Industrial Relations Commission of New South Wales.

OPERATIVE PROVISIONS

The parties to this Referral Agreement agree that the following terms, conditions and exclusions apply to such a referral:

1. For the purposes of this Referral Agreement, an industrial matter has the same meaning as the definition found at section 6 of the Act, but does not include the

termination of employment of (or the refusal to employ) any person or class of persons.

2. This Referral Agreement applies to disputes about industrial matters that occur or arise on or after the date that the Referral Agreement is entered into.

3. Notwithstanding clause 1, the employment of the general manager or another senior staff member, as defined by section 332 of the *Local Government Act 1993* (NSW), or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of this Referral Agreement.

4. The reference in clause 3 above to the employment of the general manager or another senior staff member, as defined by section 332 of the *Local Government Act 1993* (NSW), is a reference to:

    a. the appointment of, or failure to appoint, a person to the vacant position of general manager or to another vacant senior staff position, or

    b. the removal, retirement, termination of employment or other cessation of office of the general manager or another senior staff member, or

    c. the remuneration or conditions of employment of the general manager or another senior staff member.

5. A party to this Referral Agreement may notify the Commission of a dispute about an industrial matter in accordance with any procedures established by the Commission, for the referral of disputes under a Referral Agreement made pursuant to the provisions of section 146A of the Act.

6. Prior to the notification of an industrial dispute pursuant to clause 5 above, the parties to this Referral Agreement agree to:

    a. notify in writing either, the Council and the LGSA, or, the relevant union parties, of a potential dispute; and

    b. where practicable meet with either, the Council and the LGSA, or, the relevant union parties, to discuss and review settlement options.

7. For the purpose of resolving an industrial dispute, the Commission may convene compulsory conferences and require the attendance of any person whose presence, the Commission considers would help in the resolution of the dispute. A compulsory conference is to be presided over by a member of the Commission.

8. The Commission may confer with any person on any matter that may affect the resolution of an industrial dispute, without requiring the person to attend a compulsory conference.

9. The Commission must first attempt to resolve an industrial dispute by conciliation.

10. When attempting the conciliation of the industrial dispute, the Commission is to do everything that seems to be proper to assist the parties agree on terms for the resolution of the dispute.

11. During conciliation proceedings, the Commission may make a recommendation or give a direction to the parties to the industrial dispute. Failure to comply with any such recommendation or direction may not be penalised but may be taken into account by the Commission in exercising its functions under this Referral Agreement.

12. The actions that may be taken by the Commission to assist the parties pursuant to clause 10 above includes making arrangements or giving directions for the convening and conduct of conferences of the parties or their representatives (whether or not compulsory conferences and whether or not presided over by a member of the Commission).

13. The Commission, when dealing with an industrial dispute under this Referral Agreement, must consider whether the parties have bargained in good faith and, in particular, whether the parties have:

    a. attended meetings they have agreed to attend, and
    b. complied with agreed or reasonable negotiating procedures, and
    c. disclosed relevant information for the purposes of negotiation.

    The Commission may make recommendations or give directions to the parties to bargain in good faith.

14. Upon conclusion of the conciliation functions of the Commission outlined above in clauses 7 to 13, the parties to this Referral Agreement may utilise and exercise the same right as is contained in section 173 of the Act.

15. In the event that a dispute is not resolved through conciliation, then the parties to this Referral Agreement agree to refer a dispute for arbitration by the Commission.

16. In hearing proceedings under this Referral Agreement the Commission shall be limited to the same powers, orders and functions as contained in:

    a. sections 135 and 136 of the Act, save for the power in section 136(1)(b) to make or vary an award under Part 1 of Chapter 2 of the Act;

    b. Part 2 of Chapter 3 of the Act, save for the orders outlined in section 137(1)(b), that being orders to reinstate, or re-employ employees dismissed in the course of an industrial dispute or whose dismissal resulted in the industrial dispute;

    c. section 162 of the Act in relation to the general procedure of the Commission;

d. section 163(1) of the Act in relation to the rules of evidence;

e. sections 164(1) and (3) of the Act in relation to powers of the Commission as to the production of evidence, perjury and contempt;

f. sections 164A(1), (3) and (4) of the Act in relation to the disclosure and non-disclosure of matters before the Commission;

g. section 165 of the Act in relation to the issue of summonses;

h. section 166 of the Act in relation to the representation of the parties;

i. section 169 of the Act in relation to the consideration of anti-discrimination matters;

j. section 170 of the Act in relation to dealing with amendments and irregularities;

k. section 171 of the Act in relation to the imposition of conditions;

l. section 174 of the Act in relation to the powers of the Commission when an application is settled by conciliation;

m. section 175 of the Act in relation to the powers of interpretation;

n. section 176 of the Act in relation to the reconstitution of the Commission during a hearing;

o. section 177 of the Act in relation to the reserving of a decision;

p. section 178 of the Act in relation to the divided opinion of the Commission in Full Bench proceedings referred under clause 22 below;

q. section 179 of the Act in relation to the finality of decisions; and

r. section 184 of the Act in relation to the power of entry of members of the Commission and authorised officers.

17. Subject to clauses 18 and 19 below, the parties to this Referral Agreement agree to confer upon the Commission the power to make an award in a manner consistent with section 136(1)(b) of the Act.

18. The Commission's power to make an award in accordance with clause 17 shall be limited to the making of an award about a specific issue or issues that are the subject of a dispute notified under this Referral Agreement.

19. The power conferred upon the Commission in clause 17 is not intended to provide the Commission with the power to make or vary a general award that has industry application.

20. In giving effect to the powers, orders and functions referred to the Commission in clause 16 above, the parties agree that the provisions, conditions, exclusions, powers and forms contained in the *Industrial Relations (General) Regulation 2001* and the *Industrial Relations Commission Rules 1996* also operate.

21. Subject to the operation of clause 22 below, an order, determination or other decision made by the Commission by operation of this Referral Agreement is binding upon the parties to a dispute notified under this Referral Agreement, and is to be implemented forthwith.

22. A party to this Referral Agreement may appeal any binding order, determination or decision of the Commission arising from the operation of this Referral Agreement. An appeal to a Full Bench of the Commission shall be subject to the terms, procedures and powers that are akin to the provisions of Part 7 of Chapter 4 of the Act. Where such an appeal is made the Full Bench shall have the same powers as contained in section 192 of the Act.

23. Where all the parties to this Referral Agreement agree to modify or vary the Referral Agreement, then this Referral Agreement may be modified or varied and any such variation is to be in writing and signed by all the parties.

24. Where all the parties to this Referral Agreement agree this Referral Agreement may be rescinded or terminated (prior to the expiration of the term in clause 25) and any such rescission or termination is to be in writing and signed by all the parties.

25. This Referral Agreement will have a nominal term that expires on 31 October 2007. The Referral Agreement will continue to operate beyond the nominal term until a party to the Agreement affords to the other parties one months' written notice that it intends to terminate the Referral Agreement. The Referral Agreement will expire at the end of the notice period.

On behalf of the Council	On behalf of the LGSA
On behalf of the USU	On behalf of depa

On behalf of the LGEA

UNFAIR DISMISSALS REFERRAL AGREEMENT

THIS REFERRAL AGREEMENT is made this day of July in the year Two Thousand and Six, between the following parties:

INSERT NAME OF COUNCIL of insert street address, insert suburb or town in the State of New South Wales (the "Council"); and

LOCAL GOVERNMENT ASSOCIATION OF NEW SOUTH WALES or SHIRES ASSOCIATION OF NEW SOUTH WALES of Level 8, 28 Margaret Street, Sydney in the State of New South Wales (the "LGSA"); and

NEW SOUTH WALES LOCAL GOVERNMENT, CLERICAL, ADMINISTRATIVE, ENERGY, AIRLINES AND UTILITIES UNION of Level 7, 321 Pitt Street, Sydney in the State of New South Wales (the "USU"); and

DEVELOPMENT AND ENVIRONMENTAL PROFESSIONALS' ASSOCIATION of 106/118 Great North Road, Five Dock in the State of New South Wales ("depa"); and

LOCAL GOVERNMENT ENGINEERS' ASSOCIATION of Level 1, 491 Kent Street, Sydney in the State of New South Wales (the "LGEA").

RECITALS

A. The Council, the LGSA, the USU, depa and the LGEA have agreed to resolve disputes concerning the dismissal or threatened dismissal of an employee or a number of employees, who are members or eligible to be members of the USU and/or depa, and/or the LGEA, where it is alleged that the dismissal or threatened dismissal was harsh, unreasonable or unjust, by allowing such matters to be referred to the Industrial Relations Commission of New South Wales (the "Commission") as allowed pursuant to the provisions of section 146A of the *Industrial Relations Act 1996* (NSW) (the "Act") in accordance with the terms of this Referral Agreement.

B. The parties agree that they would be assisted in resolving these disputes by the Industrial Relations Commission of New South Wales.

OPERATIVE PROVISIONS

The parties to this Referral Agreement agree that the following terms, conditions and exclusions apply to such a referral:

1. The removal, retirement, termination of employment or other cessation of office of the general manager or another senior staff member, as defined by section 332 of the *Local Government Act 1993* (NSW), or any matter, question or dispute relating to any such employment, is not a matter that can be referred pursuant to this Referral Agreement.

2. This Referral Agreement will only operate in relation to dismissals or threatened dismissals that occur on or after the date that the Referral Agreement is entered into.

3. The parties agree that in referring a matter pursuant to this Referral Agreement the Commission shall have the same functions, powers, conditions, exclusions and provisions as contained in Part 6 of Chapter 2 of the Act.

4. The parties agree that in referring a matter pursuant to this Referral Agreement the functions, powers, conditions, exclusions and provisions as contained in Part 3 of *Industrial Relations (General) Regulation 2001* will function to facilitate the operation of this Referral Agreement.

5. The parties agree that in referring a matter pursuant to this Referral Agreement the functions, powers, conditions, exclusions, provisions and forms as contained in the *Industrial Relations Commission Rules 1996* will function to facilitate the operation of this Referral Agreement.

6. The parties agree that in referring a matter pursuant to this Referral Agreement the provisions and process as outlined in Practice Direction No. 17 of the Commission will function to facilitate the operation of this Referral Agreement.

7. The notification of a dispute which seeks to pursue a remedy consistent with those available under Part 6 of Chapter 2 of the Act for an alleged dismissal or threatened dismissal of an employee, may be made by the USU, depa or the LGEA in accordance with any procedures established by the Commission for Referral Agreements made pursuant to section 146A of the Act.

8. The notification of a dispute which seeks to pursue a remedy consistent with those available under Part 6 of Chapter 2 of the Act for an alleged dismissal or threatened dismissal, of a number of employees dismissed at the same time for related reasons, may be made by the USU, depa or the LGEA in accordance with any procedures established by the Commission for Referral Agreements made pursuant to section 146A of the Act.

9. The notification of a dispute in accordance with clause 8 above does not prevent the Commission from hearing a number of notifications under this Referral Agreement together or individually.

10. Prior to making a notification pursuant to clause 7 or 8 above, the USU, depa or the LGEA agree to:

    a. notify in writing the Council and the LGSA of any dismissal considered to be potentially unfair; and

    b. where practicable meet with the Council and the LGSA to discuss and review settlement options.

11. Upon making a notification pursuant to clause 7 or 8 of this Referral Agreement, the USU, depa or the LGEA agree to produce in writing for the benefit of both the Commission and the Council, an undertaking of the member or members that proceedings will not be commenced under any other Act or statutory instrument for redress of the claim concerning a dismissal or threatened dismissal that is being referred to the Commission. Such an undertaking shall be made in a manner consistent with Form 11 of the *Industrial Relations Commission Rules 1996*.

12. A notification made pursuant to clause 7 or 8 of this Referral Agreement must be made no later than 21 days after the dismissal or threatened dismissal of the employee or employees.

13. The Commission has a discretion on the same basis as the discretion contained in section 85(3) of the Act, to accept a notification filed pursuant to clause 7 or 8 of this Referral Agreement if the application has been filed outside the time limit identified at operative clause 12 above.

14. The Commission must endeavour, by all means it considers proper and necessary to settle a notification pursuant to clause 7 or 8 of this Referral Agreement, by conciliation.

15. Upon conclusion of the conciliation functions of the Commission outlined above in clause 14, the parties to this Referral Agreement may utilise and exercise the same right as is contained in section 173 of the Act.

16. In the event that an application is not resolved through the conciliation functions of the Commission outlined in clause 14 above then the parties to this Referral Agreement agree to refer the matter for arbitration by the Commission.

17. In hearing proceedings under this Referral Agreement the parties agree that the Commission shall be limited to the same powers, orders and functions as contained in:

    a. sections 87 to 90 of the Act;

    b. section 162 of the Act in relation to the general procedure of the Commission;

    c. section 163(1) of the Act in relation to the rules of evidence;

d. sections 164(1) and (3) of the Act in relation to powers of the Commission as to the production of evidence, perjury and contempt;

e. sections 164A(1), (3) and (4) of the Act in relation to the disclosure and non-disclosure of matters before the Commission;

f. section 165 of the Act in relation to the issue of summonses;

g. section 166 of the Act in relation to the representation of the parties;

h. section 169 of the Act in relation to the consideration of anti-discrimination matters;

i. section 170 of the Act in relation to dealing with amendments and irregularities;

j. section 171 of the Act in relation to the imposition of conditions;

k. section 174 of the Act in relation to the powers of the Commission when an application is settled by conciliation;

l. section 175 of the Act in relation to the powers of interpretation;

m. section 176 of the Act in relation to the reconstitution of the Commission during a hearing;

n. section 177 of the Act in relation to the reserving of a decision;

o. section 178 of the Act in relation to the divided opinion of the Commission in Full Bench proceedings referred under operative clause 19 below;

p. section 179 of the Act in relation to the finality of decisions; and

q. section 184 of the Act in relation to the power of entry of members of the Commission and authorised officers.

18. Subject to the operation of clause 19 below, an order, determination or other decision made by the Commission by operation of this Referral Agreement is binding upon the parties to this Referral Agreement and is to be implemented forthwith.

19. A party to this Referral Agreement may appeal any binding order, determination or decision of the Commission arising from the operation of this Referral Agreement. An appeal to a Full Bench of the Commission and any such appeal will be as if the provisions of Part 7 of Chapter 4 of the Act apply. Where such an appeal is made the Full Bench shall have the same powers as contained in section 192 of the Act.

20. Where all the parties to this Referral Agreement agree to modify or vary the Referral Agreement, then this Referral Agreement may be modified or varied and any such variation is to be in writing and signed by all the parties.

21. Where all the parties to this Referral Agreement agree this Referral Agreement may be rescinded or terminated (prior to the expiration of the term in clause 22) and any such rescission or termination is to be in writing and signed by all the parties.

22. This Referral Agreement will have a nominal term of 12 months. The Referral Agreement will continue to operate beyond the nominal term until a party to the Agreement affords to the other parties one months' written notice that it intends to terminate the Referral Agreement. The Referral Agreement will expire at the end of the notice period.

On behalf of the Council

On behalf of the LGSA

On behalf of USU

On behalf of depa

On behalf of the LGEA